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Craig Caldwell and Robert E. Convington dba Caldwell and Covington v. Anschutz Drilling Company, Inc. : Respondent's Petition for Rehearing and Supporting Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

CRAIG CALDWELL and ROBERT E. COVINGTON, dba CALDWELL AND COVINGTON,

Plaintiffs and Appellants,

Case No. 9587

vs.

ANSCHUTZ DRILLING COMPANY, INC., a corporation

Defendant and Respondent.

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from the Judgment of the Fourth Judicial District Court for Uintah County, Hon. Joseph E. Nelson, Judge

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INDEX

TABLE OF CONTENTS

Page

AUTHORITIES AND BRIEFS CITED

A. LEGAL TEXTS

B. STATUTE

C. REFERENCES TO BRIEFS OF PARTIES HEREIN

D. REFERENCE TO THIS COURT'S MIMEOGRAPHED OPINION HEREIN:

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The petition of the respondent, Anschutz Drilling Company, Inc., respectfully shows to the Honorable Supreme Court:

1. The above entitled court filed its opinion herein in favor of appellant and against respondent on April 3, 1962.

2. By order of the court duly entered herein, upon

good cause shown and pursuant to Rule 76 (e) (4), Utah Rules of Civil Procedure, the time in which respondent may petition for a rehearing has been extended to and including the date of the filing thereof.

3. It is respectfully alleged that the court, by its opinion and decision aforesaid, erred on the following points, to-wit:

(A) The court erred in failing to rule favorably, or to rule at all, upon respondent's contention that in this action for specific performance the plaintiffs are required to prove every element of their alleged contract by clear and convincing evidence, and in failing to apply that rule of law in weighing the evidence submitted by plaintiff. (See pages 21 and 22 of respondent's original brief.)

(B) The court erred in ruling and deciding, as a matter of law, (as the court apparently does in the third paragraph on page 2 of its opinion) that, if respondent offered to contract with appellants and waived time requirement for acceptance, appellants "would then be entitled to a reasonable time to execute the contract and make the down payment" without regard to the revocation of the offer before acceptance was completed in the manner required.

(C) The court erred in ruling and finding that appellants' agent Alloway offered to sign the contract for his principal before the respondent's offer was withdrawn, (page 2, paragraphs one and four of the opinion) for the reason that the same is entirely unsupported by the evidence.

(D) The court erred in ruling that respondent's offer was, or could be accepted without tender of delivery of the signed contract and tender of delivery of a certified check or its equivalent.

WHEREFORE Respondent prays that this action be reheard by this Honorable Court, and that said errors be corrected, and that such other order be entered as may be just.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

Statements as to the kind of case involved, the disposition in the lower court, and the relief sought by the respective parties on appeal, are all outlined in the original briefs herein and in the court's opinion, so it is deemed unnecessary to repeat them.

It is also believed that respondent's statement of facts in its original brief was reasonably comprehensive and the facts there stated will not have to be repeated. However, in view of what respondent earnestly believes was a misapprehension of facts by the court, it is believed that it will be helpful to the court, and to the cause of justice, to amplify the statement of facts with some additional specific references to the record of the testimony.

By way of introduction may it be said, however, that this is an action by which appellants seek specific performance of an alleged contract for the sale of real property (oil leases) based upon a *proposed* written

contract prepared and signed by respondent Anschutz Drilling Company and submitted to appellants, but never signed by appellants or delivered by them to respondent as required by the terms thereof, and with respect to which neither a certified check (as required by the terms thereof) nor cash (if cash is to be deemed the equivalent of a certified check) was ever delivered or *tendered* to respondent as required by the terms thereof.

Turning now to the factual matters involved specifically in the petition for rehearing, the court, in page 2, first paragraph, of its mimeographed opinion, declares that "Mr. Alloway (appellants' agent for closing the contract) *offered to sign the contract as it was.*" Again, in the fourth paragraph on the second page, the court finds and declares that "he, (Alloway) did *offer to sign the contract* and to pay the one-fourth of the money on behalf of plaintiff." (Emphasis added.)

While we can understand how the state of the record may have mislead the court in this regard, as it is quite involved, it is respectfully submitted that there is absolutely no evidence to support any such finding of fact, or from which any such finding of fact can be inferred.

For the assistance of the court we shall try to outline all of the testimony on this most important point. All of this evidence is found in the testimony of Alloway.

This was first mentioned at the trial in the testimony shown at page 55, line 20, to page 56, line 10, as follows:

Q. (Continued by Mr. Bayle) Did you make any offer to Mr. Lynch to sign the contract as it was prepared?

A. I was *willing* to sign it for Caldwell and Covington, as agent, and for myself individually.

MR. THATCHER: Object to it as not responsive and move it be stricken.

THE COURT: The answer may go out.

Q. (Continued by Mr. Bayle) Did you sign it or agree to sign it?

A. Yes, *I agreed to sign it.*

MR. THATCHER: *Object to it as being* a conclusion of the witness and not relating to any event.

MR. BAYLE: *Well, we will cure that, YOUR HONOR.*

Q. (Continued by Mr. Bayle) What did you tell Mr. Lynch in reference to *signing the contract if anything?*

A. I told him *my agency authority was limited to the agency agreement which I had taken from Caldwell and Covington.* He expressed some concern about the performance part of the contract and that is when I *agreed to be personally* bound on the contract. (Emphasis added.)

The next testimony which by any stretch of the imagination could be said to relate to the problem occurs on page 59, line 28, to page 60, line 8, in which Mr.

Alloway explains his loss of temper when Mr. Wakefield refused to accept Mr. Alloway's personal uncertified check, as follows:

> Q. Then what next occurred?
>
> A. Well, about 5:15 I really lost my temper, which I have one, and I told Brother Wakefield, "If you are not bound, I am not bound." And Dennis Drake was present at the same time.
>
> Q. Then what did he do?
>
> A. Well, the thing that sort of spurred me on a bit, I suppose in anger, was Mr. Drake came in and said, "Well, that is tough". He said, *"That is tough, that it didn't go through."* It was tough, because we were *ready, willing and able to go through with it.* (Emphasis added.)

In this connection it should be observed that Alloway's testimony is that he and his principals were ready, willing and able to go through with the deal, not that he *ever really communicated that willingness or actually tendered the required acceptance and earnest money.* A secretly entertained willingness of course can not affect the contracts of relationships of parties.

The next fragment of testimony on this point is set out first on page 78, lines 20 to 26, of the transcript, where Alloway, under cross examination, was attempting to explain away his statement to respondent's representative at the close of negotiations (page 78, line 5) that "If you're not bound, I am not bound." as follows:

> Q. Am I correct in assuming that what you meant

then was that if one party was not bound by the contract, neither was the other party?

A. Well, that was the meaning of it and the *meaning being, if you don't accept my check, what is the point in signing the contract?*

The effect of this is that Alloway, when he found that his personal uncertified check would not be accepted, and that the requirement of a certified check (or perhaps its equivalent) would not be waived, felt insulted, became angry, and decided that if his personal check was not to be accepted as the equivalent of a certified check, and and the contract proposed was not to be modified to that extent, then there was no point in him signing the contract, and hence he did not do so.

The final mention of the question of whether or not there was ever any real tender of delivery of a signed contract appears on pages 83 and 84 of the transcript, where the following exchange took place when counsel for appellants was attempting to lead his witness into testimony which would "plaster over" this hole in appellants' case:

Q. Now, with reference to the contract, Exhibit 3, Mr. Alloway, during your conversation with Mr. Lynch, did you at any time tell *him that you would sign* that contract *on behalf of Caldwell* and Covington?

THE COURT: Now, this is not proper re-direct.

MR. BAYLE: No, I am asking it on direct examination.

MR. THATCHER: We submit it repetitious, YOUR HONOR.

-(Tr. page 83, lines 21 to 30)

. . . . . .

MR. THATCHER: If there is any doubt, it would probably be quicker to let him answer, if he can.

THE COURT: You may answer.

A. Yes, I handed him my check, meaning I was ready, willing and able to do it. *The fact he would not take my check, I neglected to do it.*
-(Tr. page 84, lines 14 to 19)

It is submitted that this is all the evidence there is on the question of whether there was an offer to sign the contract unchanged or whether there was any tender of delivery thereof, as required by the terms of the written offer before it could be deemed accepted.

Again, the court in its opinion states that the fact that Alloway "did offer to pay one-fourth of the money on behalf of the plaintiff . . . ." (opinion page 2, 4th paragraph). Again at the paragraph continued at the head of page 3 of the opinion the court observes that Alloway's conduct as testified to by him and summarized by the court supports plaintiffs' theory that plaintiffs "made a valid and bonafide offer to perform" within the extended time limit of the offer.

It is respectfully submitted that neither the evidence or any reasonable inference thereon supports any finding of fact that there was any tender or offer of a certified

check, or of cash, if cash may be deemed the equivalant of the certified check upon the state of the present record.

Here again we shall attempt to present all of the evidence submitted by plaintiff on this point.

There is no question but that Alloway did twice tender his personal *uncertified* check, once to Mr. Lynch (tr. 55) and once to Mr. Wakefield (tr. 59).

Also as possibly having some remote bearing on this question is the testimony already quoted from the transcript, page 60, that appellants were "ready, able and willing to go through with it (the contract)" but again it must be borne in mind that this willingness not only as regards the signing and delivery of the contract, but also as regards the payment of tender of the earnest money which was required as a condition precedent, was not in any way communicated. Again (tr. 56, lines 26 and 27) Alloway testified that "I asked him (Lynch) to go down to the bank with me," and that Lynch replied (tr. 57 line 5), "No, I won't go down there with you." Alloway further testified (tr. 57 lines 6 to 13) with respect to Alloway's personal uncertified check as follows:

> Q. Then what did you do, if anything, in discussing the merits of the check that you had tendered to him?
>
> A. *I asked him to deposit it.* I asked him to call the bank, if he didn't believe I had sufficient money or go down with me, either one.
>
> Q. What did he do?
>
> A. *He wouldn't do anything.*

Finally, on the second time through under examina-

tion by counsel for appellants, the appellants' attorney-agent, Mr. Alloway did testify (tr. 59, lines 11 to 16 inclusive) as follows:

> Q. Now, when you were talking with Mr. Lynch, was there anything said about going to the bank and getting cash?
>
> A. *I tried to get him to cash the check, yes.*
>
> Q. What did he say about that?
>
> A. He said, *"I can't accept cash."*

It must be noted again that this is in reference to Mr. Alloway's attempt to persuade respondent's representative Mr. Lynch to leave his office and go with Alloway to another place for the purpose of assisting Alloway in getting the cash in lieu of the certified check which the contract specifically required.

There is no further evidence that we are able to find, and not one scintilla of evidence that there was ever any tender of performance by plaintiff of the acts necessary to constitute an acceptance of respondent's offer.

STATEMENT OF POINTS

POINT 1. This court should have ruled that clear and convincing evidence is necessary to make out appellants' case for specific performance.

POINT 2. The respondent, having made a simple offer to enter into a contract with appellants was not required to leave that offer open for a reasonable time or any time, but was by law entitled to withdraw the

same at any time before effective acceptance caused the offer to ripen into a contract.

POINT 3. There is no evidence to support the court's finding or ruling that appellants' agent offered to sign and deliver the contract for his principal.

POINT 4. There is no evidence on which a finding could be based that performance of the requirements of the delivery of the signed contract and payment of the earnest money required by the offer was either made or legally tendered and refused.

POINT 5. As there was no performance or tender of performance of the conditions requiring delivery of the signed contract and payment of the specified earnest money, plaintiffs' proof of the alleged contract failed as a matter of law.

ARGUMENT

POINT 1. *This court should have ruled that clear and convincing evidence is necessary to make out appellants' case for specific performance.*

While it is conceded that on appeal this court considers the evidence and every reasonable inference that may be derived therefrom in the light most favorable to plaintiff's theory of their case, when, as here, a dismissal is granted at the close of plaintiff's case at the trial, this rule, it is respectfully submitted, has a most limited and special application to cases like the one at the bar of this court, where proof of plaintiffs' (appellants') cause of action must be made by "clear and convincing evidence" as distinguished from "a fair preponderance" of the evidence.

On pages 21 and 22 of respondent's original brief herein it was, we believe, fairly and conclusively demonstrated that in this action for specific performance of an unsigned contract every element of plaintiffs' case must be proved by "clear and convincing evidence," and the Utah cases defining that very heavy burden of proof were cited.

Apparently the court completely overlooked this most important point of law, for the court nowhere in its opinion mentions or refers to the controlling principal of law. It is respectfully submitted that this oversight led the court into inadvertent error in its failure to apply the rule to the evidence in this case. It is respectfully submitted that when no reasonable mind could say that plaintiffs' evidence below amounted to "clear and convincing" proof as defined in the law of Utah referred to, then the trial court, and this court on appeal, must rule as a matter of law that plaintiffs' case fails, even though with a lesser burden of proof, it might be proper to submit the case to the trier of the facts.

The failure of plaintiffs' evidence to meet this heavy burden, or even the ordinary burden, will be more fully discussed hereafter. It is therefore respectfully submitted that this court inadvertently erred in failing to recognize and apply the rule of law that plaintiffs' case must be proved here with "clear and convincing evidence," and that upon rehearing the error should be corrected.

POINT 2. *The respondent, having made a simple offer to enter into a contract with appellant was not required to leave that offer open for a reasonable time or*

any time, but was by law entitled to withdraw the same at any time before effective acceptance caused the offer to ripen into a contract.

In its opinion (page 2, third paragraph the court says:)

> "There is no question but that Mr. Lynch, who was negotiating the contract for the defendants, could waive the strict time requirement. If he did so, *the plaintiffs would then be entitled to a reasonable time to execute the contract and make the down payment.*" (Emphasis added.)

We confess that we are somewhat reluctant to believe that court intended to say what this language apparently does say, namely: that a simple offer to contract to sell property without a specified time limit for acceptance, and even without the existence of an option contract bound by a consideration, *must* be left open for a reasonable time and cannot be withdrawn by any action or communication until such time has lapsed.

Indeed this language by the court seems to go even further than the intention of appellants, who in their brief (page 6) state their contention as follows:

> "It is plaintiffs' contention that defendant should have given them a reasonable time in which to obtain a certified check to be presented as earnest money *as they had accepted defendant's offer.*" (Emphasis added.)

Whatever may have been the court's intention in this regard, in the context of the record in this case, in

which the trial court concluded that there was no evidence to support the allegation that the offer had been accepted, and in view of the language of the court in its opinion, in which the court speaks of the offeree's indication of a "willingness" to accept the offer, and the court's comments that a finding could be made that the offerees were "prevented from accepting the offer," the quoted language of the court is certainly susceptible, and almost seems to require the interpretation that a simple offer cannot be withdrawn before a lapse of a reasonable time, even though acceptance has not caused it to ripen into a contract. It is submitted that this is clearly not the law, and that if the contract had not been formed before Saturday morning of February 25, the respondent's withdrawal of its offer at that time was valid and effective.

It is submitted that the correct statement of the law concerning revoking of an offer before legal acceptance is discussed in respondent's original brief, pages 11 to 13 inclusive, and in the authorities there referred to. We very respectfully observe that the court in its opinion does not refer to this argument, or to the authorities cited, from which, coupled with the language used by the court, it would seem there is a strong inference that the court overlooked this familiar point of law.

As further authority for the position taken by the respondent that its offer was revocable at any time before actual acceptance, we respectfully refer the court to,

Corbin On Contracts, Section 38,

the more applicable portions of which are printed

for the court's convenience in the Appendix hereof.

The quoted language from the court's opinion would not be of such great concern, perhaps, were it not for the fact that the court in its decision had directed a full trial of the issue, at which the opinion must be taken by the trial court as the law of the case. If the trial court should accept the apparent meaning of this language and rule that this court's opinion is that respondent's offer was irrevocable until after the lapse of a reasonable time, this could only lead to further expense and to a second appeal.

If this ruling stands, and a simple offer is henceforth to be irrevocable in Utah, the State's businesses are in for a rough time in their future dealings after this becomes known.

It is therefore respectfully submitted that the quoted ruling of the court is in error and should be corrected on rehearing.

POINT 3. *There is no evidence to support the court's finding or ruling that the appellants' agent offered to sign and deliver the contract for his principal.*

As indicated in the statement of facts, the court several times indicated its belief that there was evidence to support the finding that Alloway had "offered" to sign and deliver the contract as required by the terms of the offer. As indicated in the transcript of the evidence, appellants' counsel several times tried to get the appellant's agent-attorney, Mr. Alloway, to testify to that fact, but each time Mr. Alloway, who as an attorney apparently had a careful regard for he truth

and his duties to the courts, very carefully avoided making any such statement while he was testifying. Let us analyze this testimony, upon which the appellants' entire case rests.

On page 55 of the transcript appellants' counsel asks Mr. Alloway the leading question "Did you make any offer to Mr. Lynch to sign the contract as it was prepared?" And Alloway carefully evaded the purport of the leading question by saying "I was *willing to sign* it . . . ." However even that answer was striken by the court as shown by the transcript.

It was then asked by Mr. Bayle "Did you sign it or agree to sign it? And he replied "Yes, I agreed to sign it." However this was objected to, and was objectionable as being a conclusion of the witness and not relating to any event, and the validity of the objection was tacitly conceded by counsel for appellant's who avoided a specific ruling on the objection by stating "Well, we will cure that, your Honor." Hence, there is still no proper testimony in the record to support any conclusion or inference that there was a tender or offer to sign and deliver the contract.

In an effort to keep his promise to cure the objectionable statement, attorney for appellant then asked the question in proper form: "What did you tell Mr. Lynch in reference to signing the contract if anything?" and the witness Alloway replied, "I told him my agency authority was limited to the agency agreement which I had taken from Caldwell and Covington. He expressed some concern about the performance part of the contract and that is when I agreed to be personally bound

on the contract." Here again Mr. Alloway carefully avoided testifying that he offered to sign and deliver the contract or said anything about the signing and the delivery thereof. On the contrary he testified under oath that he communicated his interpretation of his agency authority as being limited so that (by necessary inference) he could not sign and deliver the contract as originally written, and further indicated in effect that he would take over the deal "personally." This of course he could not do because the offer was not made to him and his "agreement" or offer to handle the contract personally was certainly no tender of acceptance on behalf of appellant, but rather a counter offer which effectively rejected respondent's original offer, if one can assume that Mr. Alloway was then acting as agent for appellants.

The next scrap of evidence is found on page 60 of the transcript where Mr. Alloway testified that a Mr. Drake came into the office and stated "Well, that is tough." The witness continued: "He said, 'That is tough, because it didn't go through.' It was tough, because here we were ready, willing and able to go through with it." The last sentence about being ready, willing and able was obviously the witness' volunteer comment on the situation, a comment made in court and not forming any part of the transaction which was the subject of the trial.

Here again there is no evidence of any communication of readiness to perform the conditions required for acceptance of respondent's offer.

The next fragment of evidence on this point is even

less helpful to appellants. It occurs in the transcript at page 78 in which the witness Alloway was explaining his parting statement to respondent's representatives that "well, if you're not bound, I am not bound." The witness asserted that he meant that if one party was not bound by the contract, neither was the other party, and then made the additional volunteer statement "and the meaning being, if you don't accept *my check,* what is the point in signing the contract?"

Here obviously Alloway's conscience was impelling him to tell the whole truth, even though he was anxious to help his principals. The purport of this testimony, in its context, is that he saw no point in signing or delivering the contract. It explained why he did not sign it or offer to sign it. He had neglected to get a certified check, although he could have done so had he acted promptly, and apparently it did not occur to him to bring cash to respondent's office, and hence there was no point, as he saw it at the time, in tendering performance of the requirement that the contract be signed and actually delivered to respondent before it could become binding. In other words, if the offer could not be modified to accept his personal uncertified check, he saw no point in signing and delivering the contract, although that also was required before there could be a meeting of the minds of the parties. This was his mistake, not respondent's.

The final shred of evidence on this point is on pages 83 and 84 of the transcript where Alloway was asked whether, in his conversation with Mr. Lynch, he at any time told Mr. Lynch that he "would sign that contract

on behalf of Caldwell and Covington?" And over an objection that it was repitious, later withdrawn, Alloway testified carefully, "Yes, I handed him my check, *meaning I was ready, willing and able to do it.* The fact he would not take my check, *I neglected to do it.*" (Emphasis added.)

Here again the court will note that Alloway was trying hard to help his clients and still stay within the bounds of the truth. His bald testimony, shorn of its explanations and excuses, was that he "neglected" to tell Mr. Lynch that he would sign the contract. Of course the contract which is in evidence shows that it never was signed, and now the positive evidence is that there never was any offer of signing or any statement that he would sign it. Far from permitting any inference that an offer was made to supply this condition, the testimony of Alloway positively negatives any offer to sign the contract. Alloway's hopeful comment that he handed to Lynch his (uncertified) check "meaning I was ready, willing and able to do it," of course can not overcome the clear and unequivocal testimony which follows that he never did tell Lynch he was willing to do it. Certainly Lynch could not be held to have inferred, from the handing him of an uncertified check, when a certified check (or possibly cash) was required, was "sign language" for "I am ready, willing and able to sign the contract as written notwithstanding my limitations of authority and notwithstanding the fact that I do not have the earnest money and can not procure it." An uncertified check certainly was not any sign or indication of willingness to deliver a signed contract, as required.

It is respectfully submitted that from the above

evidence no inference can be drawn that any performance of the conditions or acceptance was made or tendered, or that there was even a simple offer to perform which was frustrated by respondent.

With respect to the court's comment in its opinion that "such business dealings must be carried on in good faith," and that "the plaintiffs (appellants) made a valid and bonafide offer to perform within a reasonable time as extended by defendant (respondent) but were prevented from doing so by the latters conduct," it is respectfully submitted that the court misapprehended the purport of Alloway's testimony, which is all there is on the subject, and was thereby led into inadvertent error. There is not in all of the record one scintilla of evidence that respondent acted in bad faith in any respect, or that it or its agent did anything which would obstruct or prevent Alloway from signing and tendering delivery of the signed contract. On the contrary Mr. Lynch's warning that there was another deal pending if this one was not accepted is clear evidence, properly regarded, that respondent's officers, in good faith, had explained to Mr. Alloway why they were unwilling to modify their original offer, or to provide title guarantee, etc. or to accept Alloway's uncertified check which was tendered to them, or to accept Alloway as a party to the contract on an offer made to the appellants. Alloway never claimed or stated, although several times invited so to do, that he had made any offer of delivery of a signed contract, or of a certified check, or of cash, or that he was prevented from performing by any action of the respondents. His whole testimony is that he had neglected to get the check certified while there was yet time,

although he knew of this requirement, and that because his uncertified check was unacceptable he saw no point in attempting performance on the other condition of acceptance, and so neglected to perform or offer performance.

It is submitted that appellants also must act in good faith, that they can not claim that there was a meeting of the minds and a contract formed when the conditions prescribed for acceptance of the offer were not met by reason of the "neglect" of their agent, frankly admitted, and positively testified to.

It is therefore respectfully submitted that the court erred in holding that there is evidence which would support a finding that Alloway offered to sign and deliver the contract as written and was prevented from so doing by the bad faith actions of respondent. In this connection may we emphasize that Alloway's testimony was that his neglect to tender performance in this regard was not caused by a statement that cash was not acceptable, but was caused by the refusal to accept his uncertified check. Obviously no one can contend that respondent was bound to accept Alloway's uncertified check drawn on agency funds given him for another purpose. Such action would have involved respondent in liability for conversion of the funds. Alloway was *not* able to pay without violating his trust to another party whose money he had.

POINT 4. *There is no evidence on which a finding could be based that performance of the requirements of delivery of the signed contract and payment of the earnest money required by the offer was either made or legally*

tendered and refused.

At the outset of this discussion we hope the court will not take it amiss if we comment that we believe it to be the law in America that free men can not be bound except by general law or by their contract completed on terms to which they assent at the time of the "meeting of the minds" of the parties. No man is required by law to enter into a contract, and it is a corollary of this basic principal of liberty that one making an offer may specify his own terms to suit his own ideas, even if they be crazy, and unless these terms are met, then there is no meeting of his mind, at least, and no contract, even though a by-stander (such as the court) can not see that the conditions he imposes are reasonable. One is entitled in a free country to impose unreasonable conditions if he wishes before he assents to being bound on a contract. In this connection respondent imposed and communicated clearly a condition that it would not be bound unless a certified check was *received* by respondent. To make him accept something other than the thing he has specified, at the option of someone else, is to deny him a liberty which the constitution and the law, as we understand it, guarantees to him, even though the court, and even though I might feel that he is being unreasonable in asking for a certified check instead of cash. However that may be the court did consider this point and ruled against respondent with respect to its privilege to insist upon a certified check before it could be bound by its own offer conditioned upon delivery of a certified check, and not otherwise. In principal, it is submitted, there is little difference between forcing an offeror to accept Blackacre in lieu of

his stipulated bargain for cash and forcing him to accept common stocks of known and equivalent market value, or the hand of the offeree's daughter in marriage. In each case he is *forced* to accept a substitute for his stated bargain. However, as we say, this was argued to and considered by the court, and we do not intend to belabor the point unduly. It would seem however that in principle the ruling sets a very dangerous precedent.

With respect to the tender of the earnest money (which was admittedly not paid), here again the appellant's case rests entirely upon the testimony of its agent Alloway, and here again Mr. Alloway, although carefully phrasing his answers in order to give as much comfort as possible to his principals, carefully refrained from testifying that he ever tendered either a certified check or cash, (assuming without conceding that cash is the equivalent of a certified check in a contract situation).

There is no question that he repeatedly tendered his uncertified check, but there is equally no question, and indeed appellants do not contend the contrary, that respondent was not bound to accept Alloway's uncertified check as substantial compliance with its requirement for actual delivery of a certified check. The only question remaining is whether or not (assuming cash to be the equivalant of a certified check) Alloway tendered cash for the earnest money contract and was refused. Mr. Alloway testified (tr. page 59, lines 11 to 16): "I tried to get him (Lynch) to cash the check, yes." And that Lynch replied "I can't accept cash." Alloway then testified that he asked Lynch to deposit his uncertified check or to call the bank if he doubted there was sufficient money

on deposit to cover the same and that with respect to this also Lynch "wouldn't do anything."

There is no other evidence with respect to the tender of the certified check required as earnest money, or the tender of any cash in lieu thereof.

It is respectfully submitted that properly read, and even allowing every reasonable inference that may be derived therefrom, there is no showing whatsoever which would support a finding that the earnest money was ever tendered or effectively offered and refused.

Even granting the assertion by the court that respondent must carry on its dealing in good faith, the utmost good faith does not require respondent to enter into a contract on terms to which it is unwilling to assent, and even more, *it does not require respondent to perform any work or labor, or to travel, whether* 50 *miles or* 50 *yards, or to do any other thing to aid and assist the offeror appellants to raise and to tender properly and legally the required earnest money.* When an offer is made upon prescribed terms and conditions it is exclusively the problem of the offeree to make his arrangements to comply with specified conditions for the acceptance of the offer and the completion of the contract. To hold that an offeree has the right to require the offeror, or any other person, to go to work for him, or to travel for him or to do any other thing for him to assist him in meeting the conditions and accepting the offer would be to impose involuntary servitude and slavery upon everyone who attempted to do business through a contract. It is respectfully submitted that this is not the law, and that Mr. Lynch was not required

to go to the bank to get either a certified check or cash but was entitled to rely upon the effectiveness of the prescribed conditions that the earnest money would be "received" by respondent at its office.

In this connection it must be noted that Mr. Alloway never, in all his testimony, claimed that he failed to sign and deliver the contract because of Mr. Lynch's refusal to accommodate him by going to the bank, picking up the cash, and returning it at his risk. He testified that the reason he did not sign and deliver the contract was that respondent's officers would not accept his uncertified check, and this made him angry and he therefore neglected to sign and tender the contract, but on the contrary declared "If you are not bound, I am not bound." If one is to speak of good faith, one should give some consideration to a party who declares at the conclusion of the negotiations that neither party is bound, and then relies upon an alleged contract which is not signed.

Let it be emphasized that Mr. Lynch never refused a tender of cash. His only refusal was a refusal of a request to go to the bank, which he was not bound to do, and *his statement in this regard that he could not accept cash was not or is not advanced as the reason for failing to procure and bring the cash to the office and to tender it to him.* Mr. Alloway as an attorney surely knows, and knew at the time, that no one is bound either to accept or reject cash, unless it is legally tendered to him. The requirements for a tender of cash, or of any other thing is considered on pages 16 and 17 of respondent's original brief, but was apparently overlooked

by the court, as it is not referred to in the opinion. It would seem to require a ruling contrary to that reached in the opinion.

The court seems to feel that the conduct above outlined, as reported through Alloway's testimony, would support an inference and a finding that Mr. Lynch was "offered" the cash and refused it. It is respectfully submitted that this is not so. Generally, as shown in respondent's original brief a valid tender of money requires that the money be *present, ready, produced, and offered to the person who is entitled to receive it.* Our legislature has seen fit to relax this strict rule, but not to the extent that the court's opinion would relax it. Sec. 78-27-1, U.C.A. 1953, is as follows:

> "78-27-1. An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property."

The relaxation of the ancient requirements of legal tender thus far, but no farther, shows a clear legislative intention to hold to the ancient common law rules relating to tender of money required to be paid, or tender of the written instrument, except as specified in the statute. It must be noted that the statute requires that the offer be in writing, and that it be not accepted, or the offer is not the equivalent of a tender of delivery or payment. Here no one ever testified or claimed that there was ever any offer in writing to pay cash or to pay a certified check, or to deliver the signed contract. On the contrary the evidence is clearly to the

contrary. No offer either orally or in writting was ever made. Nor can it be said from the evidence in the record that the conduct of Lynch prevented appellant's agent from tendering cash. Alloway is a licensed and practicing attorney, and must be presumed to have known the effect of a tender of payment upon an unwilling recipient. He very carefully refrained from testifying that this statement by Mr. Lynch prevented him from tendering cash and his entire explanation is based upon his pique and anger resulting from the slight given his personal uncertified check. If he had been misled thereby he, of course, would have said so. It is unbelievable that he could have been misled, and it is submitted that reasonable minds can not differ in this regard in view of his skills and standing and his testimony. Certainly there is no "clear and convincing" evidence from which it could even be inferred that Lynch's statement prevented him from making a tender of cash and procuring for his principals the benefit of a proper legal tender. The most that can be said for his evidence is that he tried to "force" Mr. Lynch into waiving the conditions of his offer, and that when he found he could not, in view of his own doubt about his authority to execute the contract without the changes, and when he found he could not protect his principals and himself by entering into the contract in his own name, he abandoned his efforts, declaring that neither party was bound.

As between two possible inferences, equally acceptable, the trier of the facts can not be permitted to speculate, but as a matter of law he who has the burden of proof must fail on such a record, and this is particularly true where as here, the burden is to prove the case, and

every element thereof, by "clear and convincing" evidence.

It is therefore respectfully submitted that the court erred in holding that the record discloses evidence which would support a finding of either a tender or an offer of delivery of the signed contract and payment of the required earnest money. This error should in law and justice be corrected.

POINT 5. *As there was no performance or tender of performance of the conditions requiring delivery of the signed contract and payment of the specified earnest money, plaintiffs' proof of the alleged contract fails as a matter of law.*

It would seem that little need be added on this Point 5, although it appears to be necessary for logical completness. A party can not be bound upon a contract merely because he did not "cooperate" with and assist the offeree in meeting prescribed conditions of acceptance, nor can he be bound upon a contract merely because he may have had an ulterior motive (such as a better deal in the background) for refusing to cooperate with and assist the offeree in perfecting the offeree's acceptance. Having made the offer he is entitled to insist upon strict performance with the conditions thereof, and he is further entitled to withdraw the same at any time before the power to create the contract by acceptance has been completely and effectively exercised. It is only when this power has been completely exercised that the contract results and either party becomes bound, and clearly a secret willingness to perform the conditions required by the offer is not an acceptance. Equally clearly, we submit, neither is a mere manifestation of

willingness to exercise the power by meeting and performing the prescribed conditions. In this case, it is submitted, the record is clear that Mr. Alloway never did exercise the power which had been conferred upon his principals and that this power was revoked not later than Saturday morning when Mr. Alloway was told that the land had been committed to another party in as much as he had not concluded the contract the night before. In this connection we again respectfully submit to the court the citations in respondent's original brief with respect to offeree's power of acceptance and acceptance, and to *Corbin on Contracts, Sec.* 38, hereinbefore mentioned.

It is respectfully submitted that upon the state of the record the law required the trial judge to grant the motion of dismissal and that the judgment entered thereon should be affirmed.

CONCLUSION

It is respectfully submitted that this Honorable Court inadvertently erred in the particulars hereinbefore set out and that such errors should be corrected and that upon rehearing the opinion of the court should be withdrawn and rewritten in accordance with the contentions contained herein and that the judgment of the trial court below should be affirmed.

Respectfully submitted,
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APPENDIX

Quotation from CORBIN ON CONTRACTS, Sec. 38:

38. *Offers Are Usually Revocable*

When one party makes an offer to contract with another he creates a power of acceptance in that other; but also, except in the cases that are hereafter discussed, *he retains a power of revocation and withdrawal.* The method of exercising this power varies; usually it is by giving notice to the offeree. By exercising this power to revoke—by an effective revocation, the offeree's power of acceptance is terminated. After an acceptane has beome effective, there is no power in either party to revoke or withdraw.

Even though the offeror states when he makes the offer that the offeree shall have a definitely stated time in which to accept, or states that the offer will remain open for a definite time, the offer is nevertheless revocable at the will of the offeror. An offer of this kind seems to be what some business men mean by a "firm offer". There is an implied promise not to revoke; but if the parties think that it is effective to deprive the offeror of the power to revoke, they are mistaken.

Not infrequently, especially in the case of a written offer, it is expressly stated that it shall "not be subject to countermand." by this, no doubt the offeror understands that he is promising not to revoke the offer for the prescribed period, or for a reasonable time; and both parties may believe that the offer is thereby made

irrevocable. Nevertheless, there still remains a power to revoke. The express or implied promise not to revoke is not enforceable, unless it is under seal, or a consideration is given in exchange, or the offeree has changed his position in reliance upon it. The effect of these factors in making an offer irrevocable is discussed hereafter.

A statement by the offeror that his offer will remain open for a specified time is not wholly inoperative, even though it does not deprive him of the power to revoke. Its effect is to determine exactly the duration of the power of acceptance, in the absence of some new terminating factor such as a notice of revocation or a rejection. It makes no difference whether the stated time is unreasonably long or unreasonably short; it is nevertheless controlling, so that an acceptance after the expiration of the stated time is too late and an acceptance prior to such expiration is in time even though the contract is now very disadvantageous to the offeror.